

Agenda

Item #7



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members

From: Jonathan Wayne, Executive Director

Date: March 19, 2009

Re: Staff Recommendations on Two Policy Issues

In response to direction that you provided at your November 24, 2008 meeting, the Commission staff sent out an invitation to interested persons inviting them to take part in a working group to consider two issues:

- *Issue #1.* If a candidate appears in advertising sponsored by a third-party regarding issues unrelated to the candidate's election, does the advertising constitute a contribution to the candidate's campaign? This question was raised by the involvement of 2008 House candidate Alexander Cornell du Houx in advertising sponsored by Votevets.org concerning U.S. Senator Susan Collins' record on the conflict in Iraq.
- *Issue #2.* Did the Commission's decisions in 2006 applying the Commission's express advocacy rule move the express advocacy line and thereby influence campaign mailings sent in the 2008 elections?

January 13, 2009 Meeting

The working group held one meeting on January 13, 2009. The participants included

State Senator Debra Plowman
Alex Pringle, Senate President's Office
Arden Manning, Chair, Maine Democratic Party
Daniel W. Walker, counsel for Maine Democratic Party
Daniel I. Billings, counsel for 2008 Maine Senate Republican candidates
Ann Luther, Maine Citizens for Clean Elections
Alison Smith, Maine Citizens for Clean Elections
Jill Ward, Maine Citizens for Clean Elections

Pam Cahill, lobbyist for Maine Citizens for Clean Elections
Assistant Attorney General Phyllis Gardiner
Assistant Director Paul Lavin
Executive Director Jonathan Wayne

Phil Roy (treasurer for the Maine Republican Party) and attorney Michael K. Mahoney wished to attend, but were unable to make the January 13th meeting because of scheduling conflicts. The Maine Civil Liberties Union submitted written comments (attached), but no representative of the organization was able to attend the meeting.

The discussion was very constructive, and the participants who were present at the meeting reached a consensus on both issues.

Recommendation on Issue #1

The working group first considered the issue of candidates for Maine state office appearing in advertising sponsored by third-party organizations on issues unrelated to the candidate's campaign. The group agreed to recommend that the Commission include in its 2010 Candidate Guidebook advice to candidates that if a candidate participates in advertising paid for by third-parties, the candidate *could* be accepting a contribution. I have attached an example of such advice for traditionally financed candidates in the 2010 Candidate Guidebook. A slightly different version of the advice would appear in the section of the guidebook for Maine Clean Election Act candidates.

Recommendation on Issue #2

The working group decided that the Commission narrowly applied its express advocacy rule (Chapter 1, Section 10(2)(B)) in some of its October 20, 2006 decisions regarding mailers sent by the Maine Democratic and Republican Parties. At that 2006 meeting, the Commission decided by a vote of 2-1 that the mailers did not expressly advocate for the candidates mentioned in the mailers. (Two of the mailers are attached.) In the 2008 elections, the political parties relied on the Commission's 2006 decisions in formulating language for political communications.

The working group recommends to the Commission that it apply a slightly broader interpretation of express advocacy in future elections. It recommends that the Commission amend its existing advice on independent expenditures to clarify that, in future elections, literature similar to the mailers considered on October 20, 2006 *could* be considered express advocacy. I have attached a proposed insertion to page 1 of the Commission's Advice Regarding Independent Expenditures, along with page 11 of the advice memo for your reference. I have also attached a sample piece of campaign literature created by the Commission staff which could be found to be express advocacy in future elections. Thank you.

Attachments

- Proposed insertion to 2010 Candidate Guidebook (to address issue #1)
- Proposed insertion to page 1 of Commission's Advice Memo Regarding Independent Expenditures (to address issue #2), along with pages 2 and 11 for your reference and a sample mailer
- Minutes of October 20, 2006 meeting
- Two mailers determined by the Commission on October 20, 2006 not to be express advocacy
- Comments from MCLU dated December 24, 2008

Issue #1: Proposed Insertion to 2010 Candidate Guidebook on Advertising Sponsored by Third-Parties

Definition of Contribution

The term "contribution" is defined in the Election Law to include:

"A gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing the nomination or election of any person to state, county or municipal office or for the purpose of liquidating any campaign deficit of a candidate"

Coordinating Expenditures with Third-Parties

Political action committees, party committees and individuals are permitted to spend money to support or oppose candidates, but they generally must make the expenditures independently of the candidate's campaign. These expenditures are known as independent expenditures.

The Election Law states that: "Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate." (21-A M.R.S.A. § 1015(5)) This means that if any person or organization makes an expenditure in support of you and has consulted with you on the expenditure, you have accepted an in-kind contribution. Such a contribution is subject to the \$250 or \$500 limit. . . .

Because independent expenditures may cause matching funds to be paid to a candidate's publicly funded opponent, some candidates may wish to tell supporters not to make independent expenditures in support of their campaigns. You are allowed to ask third-parties not to spend money in support your candidacy. Even if the third-party were to spend money subsequently, merely making a request not to make an independent expenditure would not constitute cooperation.

Appearing in Advertising Sponsored by Third-Parties

In 2008, the Commission considered advertising concerning federal issues of public policy in which a candidate for state office appeared. The advertisement portrayed the candidate in a positive light, but did not mention his candidacy. In that instance, the Commission applied the legal definition of "contribution" and determined that the candidate's involvement in the advertisement did not constitute a contribution to the candidate's campaign.

Please be aware, however, that if an individual or organization invites you to appear in a paid advertisement, the value of the advertising *could* be considered a contribution to your campaign. If the advertisement qualifies as a contribution, you would be required to report receiving the value of the contribution. It would count toward the contribution limit that applies to the office you are seeking. Please feel free to contact the Commission staff to receive advice on what factors the Commission might consider in determining whether the advertisement would be a contribution.

Advice Regarding Independent Expenditures for the 2008 General Election

Please note: The advice from staff in this memo is not binding on the Commission, and the Commission will judge each matter brought before it on a case-by-case basis. Please contact the Commission staff at the above telephone number or mailing address for more information regarding independent expenditures. A copy of the relevant law (21-A M.R.S.A. § 1019-B) is attached with the corresponding Commission rule regarding independent expenditures.

What is an "independent expenditure?"

Independent expenditures are payments or obligations made by individuals and organizations for certain communications referring to clearly identified candidates.

Before October 1, 2008 (more than 35 days before the general election, including election day): independent expenditures are payments or obligations made for communications (for example, advertisements and literature) that expressly advocate the election or defeat of a candidate.

On or after October 1, 2008 (within 35 days of the general election, including election day): payments or obligations made for communications are presumed to be independent expenditures if the communication is disseminated within 35 days before the general election, names or depicts a clearly identified candidate, and involves a race in which a Maine Clean Election Act certified candidate is running. This 35-day period begins on October 1 and ends on November 4 and is often referred to as the "rebuttable presumption period." Some communications are exempt from the presumption, such as slate cards sent by political party committees (please see exceptions below).

How do I know if my advertisement or literature "expressly advocates" the election or defeat of a candidate?

The term "expressly advocate" is defined in Chapter 1, Section 10(2)(B) of the Commission Rules, which can be found on page 11 of this memo. The definition includes phrases such as "Jones for House of Representatives" or "Vote for the Governor," and other words which in context can have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates.

In 2009, the Commission gave further consideration to some of its 2006 determinations applying the express advocacy rule and the effect of these decisions on campaign activity in the 2008 general election. In order to provide better guidance to organizations making campaign-related expenditures in future elections, the Commission decided that the attached example of campaign literature could be considered express advocacy under Chapter 1, Section 10(2)(B).

**COMMISSION RULES, CHAPTER 1, SECTION 10
REPORTS OF INDEPENDENT EXPENDITURES**

1. **General.** Any person, party committee, political committee or political action committee that makes an independent expenditure aggregating in excess of \$100 per candidate in an election must file a report with the Commission according to this section.
2. **Definitions.** For purposes of this section, the following phrases are defined as follows:
 - A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.
 - B. "Expressly advocate" means any communication that uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!".
 - C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.
3. **Reporting Schedules.** Independent expenditures must be reported to the Commission in accordance with the following provisions:
 - A. Independent expenditures aggregating in excess of \$100 per candidate per election but not in excess of \$250 made by any person, party committee, political committee or political action committee must be reported to the Commission in accordance with the following reporting schedule, except that expenditures made after the 14th day before an election must be reported within 24 hours of the expenditure.


(FRONT)

ANNE BRANDT
STATE REPRESENTATIVE

A NEW DIRECTION FOR MAINE.

Paid for by the Maine Independent Party, 12 Main Street, Augusta, ME 04333
This communication is not authorized by any candidate or candidate's committee.

ADDRESS BLOCK

- 
- Working to make health care affordable for Maine families.
 - Dedicated to improving Maine schools.
 - Building a stronger Maine economy.
 - Committed to lowering energy costs and investing in Maine alternatives energy sources.

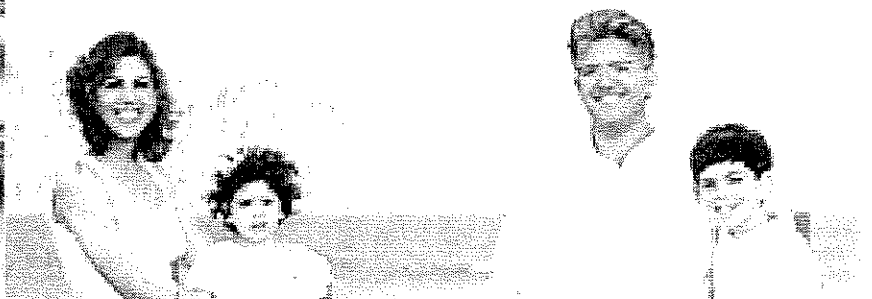
(BACK)

**MAINE FAMILIES DESERVE A REPRESENTATIVE
WHO WILL FIGHT FOR THEM.**



**GROWING OUR ECONOMY
KEEPING TAXES LOW
LOWERING ENERGY COSTS**

Call Anne Brandt at (207)567-8910 and thank
her for fighting for Maine families!





STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the October 20, 2006 Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Commission's Meeting Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Chair (Pro Tempore) Hon. Andrew Ketterer; Hon. Vinton E. Cassidy; Hon. Michael P. Friedman. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:05 A.M., Chair (Pro Tempore) Andrew Ketterer convened the meeting. The Commission considered the following items:

Agenda Item #1 – Ratification of Minutes of the September 22, 2006 Meeting

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission adopt the minutes as printed.

Ms. Gardiner said that the minutes should include a description of the discussion and motion that occurred during the transcribed portion of the meeting.

Mr. Wayne asked if the staff should amend the minutes and present them to the Commission at its next meeting.

Mr. Ketterer asked if the ratification of the minutes was necessary for an appeal to go forward. Ms. Gardiner replied that it was not.

Mr. Cassidy moved, Mr. Friedman seconded, and the Commission voted unanimously (3-0) to table Agenda Item #1.

OFFICE LOCATED AT: 242 STATE STREET, AUGUSTA, MAINE
WEBSITE: WWW.MAINE.GOV/ETHICS

PHONE: (207) 287-4179

FAX: (207) 287-6775

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #13 – Request for Matching Funds/Benjamin Meiklejohn

Jon Bartholomew said that there was no other reasonable interpretation of the mailer sent by the Democratic Party than as advocacy for the election of Anne Rand.

Mr. Ketterer asked Mr. Bartholomew what he would recommend. Mr. Bartholomew said that the Commission should consider the mailers to be express advocacy and trigger matching funds.

Michael Saxl said that the Commission decided that some of the advertisements aired in the gubernatorial election were not express advocacy. Mr. Saxl said that the party designed its mailers based on that decision.

Benjamin Meiklejohn joined the meeting by telephone.

Mr. Meiklejohn said that the mailer included the words "Anne Rand, State Representative." Mr. Meiklejohn said that considering that Anne Rand was not at the time a state representative, the mailing must have advocated for her election. Mr. Meiklejohn said that the mailer fit the "other language" provision of the statute.

Mr. Wayne said that the staff recommendation was based on the Commission's ruling on the Republican Governors Association ads. Mr. Wayne said that it was hard to consider the Democratic Party mailings express advocacy when the Commission determined that the RGA ads were not.

Mr. Meiklejohn said that based on the Commission's decisions, the parties could put up signs that do not contain express advocacy without triggering matching funds.

Mr. Ketterer said that Mr. Meiklejohn's comments were well received and there may be statute changes in the future.

Mr. Meiklejohn said that his matter was a separate issue from the ads in the gubernatorial race.

Mr. Wayne said that the Republican Governors Association ad displayed Chandler Woodcock's name and office sought at the very end. Mr. Wayne said that the Commission determined that the other language in the ad related to issues. Mr. Wayne said that a sign or bumper sticker with just the name of a candidate and the office sought could be considered to be express advocacy because it would not contain any other language.

Ms. Gardiner said that the Commission's September 22 decision should not be taken to mean that mentioning the name of the office does not make a communication express advocacy. Ms. Gardiner said that the ads were considered in context.

Mr. Cassidy asked Mr. Wayne how he determined the staff recommendation. Mr. Wayne said that both of the mailers contained enough issue content so that they were not express advocacy.

Mr. Cassidy asked if a lawn sign stating only "Anne Rand, Representative" would be considered express advocacy. Mr. Wayne said that it would be express advocacy because there would be no discussion of issues. Mr. Wayne said that the Commission's rules have specific examples of express advocacy, including signs and bumper stickers.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff's recommendation and pay no matching funds.

Mr. Friedman said that the mailers contained express advocacy. Mr. Friedman said that there was little discussion of issues in the mailers and they should trigger matching funds.

Mr. Cassidy said that the mailers were similar to the ads discussed at the September 22 meeting.

The Commission voted 2-1 to accept the staff recommendation. Mr. Cassidy and Mr. Ketterer voted for the motion; Mr. Friedman voted against the motion.

Agenda Item #14 – Request for Matching Funds/W. Bruce MacDonald

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation and pay no matching funds.

Mr. Friedman said that unlike the mailers discussed in the previous agenda item, the materials seemed to be issue-oriented. Mr. Friedman said that they did not include the name of the office sought by the candidate.

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #15 – Request for Matching Funds/Jayne Crosby Giles

Jayne Crosby Giles said that she received both campaign and non-campaign mailers relating to Walter Ash on the same day. Ms. Crosby Giles said that the mailers contained overlapping themes, causing confusion among voters as to which of the mailings were advocating for Walter Ash's election.

Mr. Friedman asked if it would have made a difference if Ms. Crosby Giles had not received the mailings all at the same time. Ms. Crosby Giles said that receiving them at the same time resulted in the mailings being a different issue from her previous complaint and clearly express advocacy.

Jon Bartholomew said that he disagreed with some of the Commission's previous decisions and supported Ms. Crosby Giles' complaint. Mr. Bartholomew said that the Commission should consider the context of the mailings and not just look for the "magic words" to determine express advocacy.

Dan Billings said that Patricia LaMarche's appeal of the Commission's decision on the Republican Governors Association ads was currently before the court. Mr. Billings said that if

the court were to strike down the Commission's earlier decision, it should revisit the items discussed at the present meeting.

Mr. Ketterer asked Mr. Billings for his opinion on the issue of campaign and non-campaign mailings arriving at the same time. Mr. Billings said that it was likely a coincidence and not a coordinated act.

Mr. Cassidy said that he didn't see a connection between the mailings. Mr. Cassidy said that if they were coordinated, they probably wouldn't have been mailed at the same time.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation and pay no matching funds.

Mr. Friedman said that the mailing was express advocacy because despite some mention of issues, the ultimate purpose of the mailing was to advocate for Walter Ash's election.

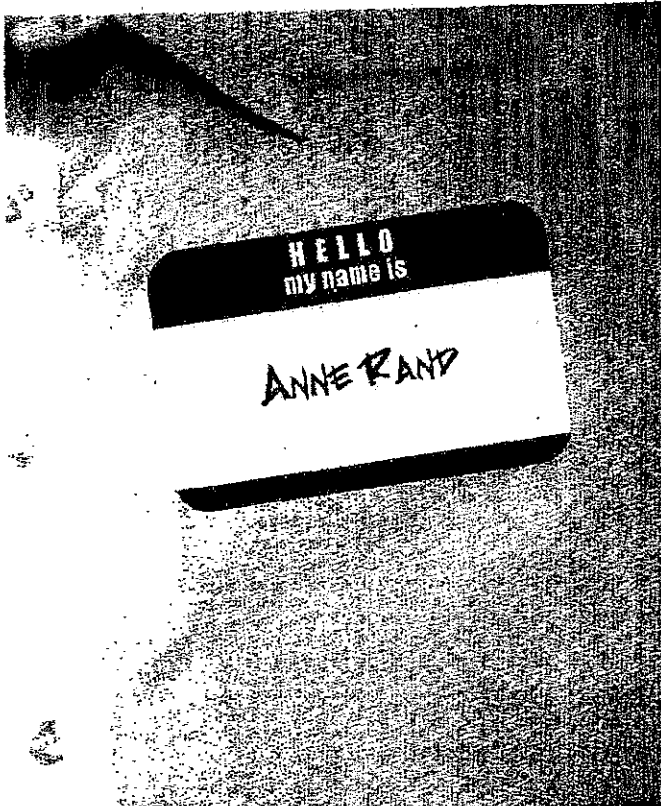
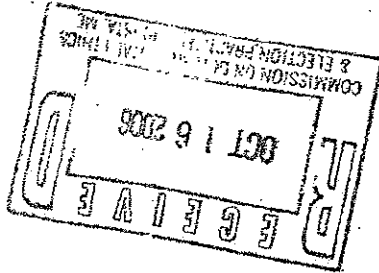
Mr. Ketterer said that he agreed with Mr. Cassidy but the Commission should consider each case individually and in context.

The Commission voted 2-1 to accept the staff recommendation. Mr. Cassidy and Mr. Ketterer voted for the motion; Mr. Friedman voted against the motion.

Agenda Item #16 – Request for Matching Funds/John N. Frary

Mr. Wayne said that John Frary, chair of the Franklin County Republicans, brought the request on behalf of Republican candidate Lance Harvell. Mr. Wayne said that the literature was handed out at the University of Maine at Farmington. Mr. Wayne said that the literature contained Mr. Harvell's responses to a survey from the Maine Economic Research Institute. Mr. Wayne said that it was not clear whether the literature was intended to oppose Mr. Harvell.

Commission
determined mailer
not to be
express advocacy
(10/20/06)



Anne Rand

Anne Rand
State Representative

ANNE RAND

*GOOD PAYING JOBS
AND LOWER TAXES*

- Expanding property tax relief for Maine home owners
- Targeting tax relief for the middle class and small businesses, not Bush's billionaires
- Eliminating the tax on businesses' investment to nurture Maine's growing businesses

ANNE RAND

*STRENGTHENING COMMUNITIES
AND PROTECTING FAMILIES*

-
-
-
-
-

ANNE RAND

State Representative

MAINE VALUES, AN INDEPENDENT VOICE

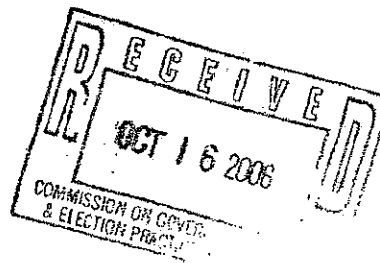
Paid for by the Maine Democratic Party, 16 Winthrop Street, Augusta, ME 04332
This Communication is not authorized by any candidate or candidate's committee.

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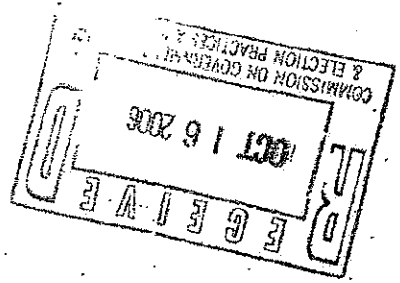
Non-profit Org.
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Permit #504
Augusta, ME

Tray 3 *****AUTO**SCH 5-DIGIT 84101

DOUGLAS EMERY
or CURRENT RESIDENT
11 EXCHANGE ST APT 3G
PORTLAND ME 04101-5006



Not express
advocacy
(10/20/08)



NORWAY	14 MI.
PARIS	15 MI.
DENMARK	23 MI.
NAPLES	23 MI.
SWEDEN	25 MI.
POLAND	27 MI.
MEXICO	37 MI.
CHINA	94 MI.
PERU	26 MI.

Anne Rand
State Representative
A new direction for Maine...



Anne Rand

is working to build a stronger future for Maine and is standing up for hard-working Mainers.

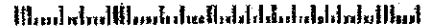
That is why **Anne Rand** is committed to:

- ☒ Growing good-paying jobs and building a stronger Maine economy.
- ☒ Expanding property tax relief for Mainers.
- ☒ Working to make health care affordable for Maine families.
- ☒ Dedicated to improving Maine schools and creating new opportunities.
- ☒ Practicing fiscal responsibility here in Maine - and demand it from Washington.

Non-profit Org.
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Augusta, ME

Tray 4 *****AUTO**3-DIGIT 041

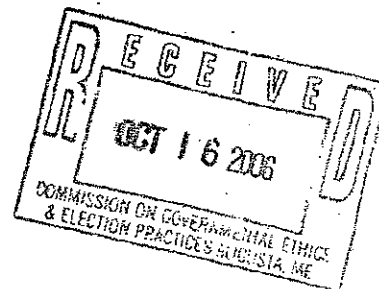
BENJAMIN CHIPMAN
or CURRENT RESIDENT
PO BOX 1254
PORTLAND ME 04104-1254



DESIGNED, PRINTED & MAILED IN MAINE

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*Paid for by the Maine Democratic Party, 16 Winthrop Street, Augusta, ME 04332
This Communication is not authorized by any candidate or candidate's committee.*





MAINE CIVIL LIBERTIES UNION FOUNDATION

December 24, 2008

VIA ELECTRONIC AND REGULAR MAIL

Jonathan Wayne, Esq.
Executive Director
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04333

Re: Campaign Finance and the "Express Advocacy" Rule

Dear Jonathan:

Thank you for the opportunity to provide comments to the Commission concerning the "express advocacy" rule and its application to the regulation of political speech. It shows great wisdom that the Commission is taking the time to reflect upon its own practices and precedents, and it is especially insightful that the Commission is engaging in this discussion outside of the heated context of election season.

The Maine Civil Liberties Union feels strongly that the "express advocacy" rule provides an appropriate balance between the government's interest in regulating campaign materials and the freedom of political speech protected by the Maine and United States constitutions. In the past we have spoken forcefully—to the Commission and the Legislature—about the dangers of theorizing motive, intent, or context when it comes to the regulation of political speech. The government's role is limited in this area, and sticking to the limits ensures that freedom of speech is not needlessly infringed.

In interpreting the legitimate scope of regulations on political speech, which forms the core of the First Amendment's protections, the U.S. Supreme Court has developed the "express

advocacy” test, which cautions that the extent of the government’s legitimate interest only extends to material that expressly advocates for the support or defeat of a particular political position. Simply put, the “express advocacy” rule defines the line between speech that may be regulated and speech that may not. There are complex and misleadingly-named rules throughout our jurisprudence, but the “express advocacy” rule is not one of them. It has two parts: there must be “advocacy”—in support or opposition of a particular candidate or ballot measure—and it must be “express”—traceable to a particular word or set of words.

All speech which does not in express terms advocate the election or defeat of a clearly identified candidate or ballot measure is outside the scope of permissible government regulation. “So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views,” *Buckley v. Valeo*, 424 U.S. 1, 45 (1976), and they are also free from reporting and disclosure requirements. *Id.* at 79-80. See also *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 238. As the U.S. Supreme Court recognized in *Buckley*, the First Amendment demands a bright line because political campaigns in the real world so rarely provide one. “Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.” *Id.* at 42.

In the years since *Buckley*, the express advocacy doctrine has become an indispensable bulwark against overzealous efforts to regulate core political speech. From *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (en banc) (finding that Commission’s enforcement suit against a tax protest group to be “totally meritless”), to *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) (invalidating FEC regulations on limiting voter guides), the government has suffered “a string of losses in cases between the FEC and issue advocacy groups

over the meaning of the phrase ‘issue advocacy’ and the permissible scope of the FEC’s regulatory authority over political speech.” *Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997) (authorizing an award of fees and costs against the Commission for bringing enforcement proceedings against an issue group in clear violation of this Court’s “express advocacy” doctrine). *See also Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 1999).

Those cases can and should stand as a cautionary tale. The express advocacy rule provides political speech with the “breathing space” required by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 433 (1963). In that way, it functions much like the “actual malice” rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), or the “incitement” rule of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court recognized in *Sullivan* that “neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct. . . .” *Id.* at 273. The express advocacy rule creates an equivalent constitutional shield that is similarly designed to safeguard uninhibited public debate on issues of obvious public concern.

Just last term, the Supreme Court reiterated that the proper inquiry for “express advocacy” focuses “on the substance of the communication rather than amorphous considerations of intent and effect.” *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2666 (2007); *citing Buckley*, at 43- 44. Rules tailored to the substance of communications are easy to understand and easy to fairly enforce. In *Buckley*, the Supreme Court went so far as to provide a list of terms denoting express advocacy and to caution regulators against restricting political speech lacking such clear indicia. *See id.*, at 44 fn. 52 (restricting the application of political speech restrictions to “communications containing express words of advocacy of election or

defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

Hewing to the “express advocacy” rule will eliminate confusion on the part of the public and will provide a basis for fair and consistent enforcement by the Commission staff. Bluntly, an alternative scheme based on interpretation of context, or a searching inquiry into “purpose” or “effect” is unacceptable. The Supreme Court has clearly and unambiguously rejected the “purpose” and “effects” test for political speech regulation and has cautioned against context-based inquiries into “the open-ended rough-and-tumble of factors,” which “invit[es] complex argument in a trial court and a virtually inevitable appeal.” *Wisconsin Right to Life*, 127 S.Ct. at 2667, citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

In its application of the “express advocacy” rule, the Commission should continue to make it clear that any doubts or ambiguity should and will be resolved in favor of the right of individuals and groups to engage in political speech without restriction. If there is any reasonable doubt about whether communications or activities comes within the purview of the statute, the Commission “must give the benefit of any doubt to protecting rather than stifling speech.” *Sullivan* 376 U.S.at 269-270. “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.” *Wisconsin Right to Life*, 127 S.Ct. at 2669.

Applying these principles to the hypothetical scenarios you present, neither the appearance of a candidate in a third-party’s promotional material, nor a communication touting a state candidate and naming the office they seek and/or currently hold, in an of itself, constitutes “express advocacy”. One may reasonably believe that the intent of the producers of this material was to present candidates in as positive a light as possible so as to increase the chances of their

election, but there are countless examples of ways that this might be accomplished that could not reasonably trigger government regulation, and no consistent, easily-administered, discretion-free rule to distinguish such scenarios regulation. One hypothetical example that comes to mind would be a television station that plays "The Terminator" every night for a month preceding an election in which Arnold Schwarzenegger is a candidate; the television station might intend the additional exposure would lead people to vote for Mr. Schwarzenegger, but there would be no way to reasonably regulate such activity.

The Commission should approach the task of regulating political speech with trepidation. Straying beyond the narrow, judicially-sanctioned guidelines, including the "express advocacy" rule can result in time-consuming, costly litigation, in which the government is required to provide substantial justification for the what, why, and how of its regulations, and, should it be unsuccessful, to pay the litigation expenses of the plaintiff. More importantly, though, the Commission might inadvertently infringe on the freedom of speech, which forms the core of our political system, thus undermining our democracy.

The MCLU looks forward to working with the Commission in the future. Please feel free to call on us if we can provide additional comments or assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Zachary L. Heiden", with a long horizontal line extending to the right.

Zachary L. Heiden, Esq.
MCLU Legal Director